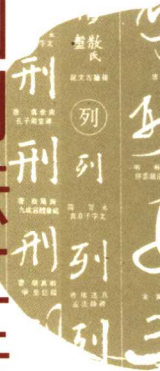




北京师范大学刑事法律科学研究院  
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# 中国刑法立法之演进

高铭暄 赵秉志 著



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Gao Mingxuan & Zhao Bingzhi**

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**高铭暄**,男,1928年生,浙江玉环人。1951年北京大学法律系本科毕业,1953年中国人民大学法律系刑法研究生班毕业。1953年起在中国人民大学法律系(后改为法学院)任教,先后担任中国人民大学法律系主任、法学院院务委员会主任职务,曾兼任国务院学位委员会第二、三、四届学科评议组成员、法学组召集人,中国法学会副会长、中国法学会刑法学研究会会长等职务。现任北京师范大学刑事法律科学研究院名誉院长、特聘顾问教授、博士生导师,中国人民大学荣誉教授、博士生导师,兼任中国法学会学术委员会副主任、中国法学会刑法学研究会名誉会长、国际刑法学协会副主席暨中国分会主席、最高人民法院特邀咨询员、最高人民检察院专家咨询委员会委员等职务。曾自始至终参加新中国第一部刑法典即1979年刑法典的起草工作,并且参加了国家立法机关主持的1997年刑法典的修订、研讨工作暨多年来的有关刑法立法工作,多次参与最高司法机关制订刑事司法解释的研讨咨询工作。主要研究领域为中国刑法、刑事立法、国际刑法。独著、主编、合著(译)、参著专业书籍90余部,发表文章270余篇。其中代表性论著有:《中华人民共和国刑法的孕育和诞生》(1981年)、《刑法总则要义》(1986年)、《中国刑法学》(主编,1989年)、《刑法学原理》(三卷本,主编,1993年)、《刑法问题研究》(1994年)、《新中国刑法立法文献资料总览》(与赵秉志教授合编,1998年)、《新型经济犯罪研究》(主编,2000年)、《刑法肆言》(2004年)等。部分著作还曾获得国家图书奖、教育部人文社会科学研究优秀成果奖一等奖、全国普通高等学校优秀教材特等奖以及中国司法部优秀教材一等奖等奖励。

**赵秉志** 男,1956年生,河南南阳人。新中国首届刑法学博士(1988),美国杜克大学法学院访问学者(1990—1991)。北京师范大学刑事法律科学研究院院长暨法学院院长、教授、博士生导师。兼任中国法学会常务理事暨学术委员会委员、中国法学会刑法学研究会会长、国际刑法学协会中国分会常务副主席、国务院学位委员会学科评议组法学组成员、最高人民法院特邀咨询员、最高人民检察院研究室顾问等职务。曾任国家重点研究基地中国人民法学会刑事法律科学研究中心主任(1999—2005)。曾作为全国人大常委会法工委刑法修改小组成员全程参加中国刑法典的修订研拟工作(1988—1997)。国家授予“作出突出贡献的中国博士学位获得者”称号(1991);中国法学会评定为首届“全国十大杰出青年法学家”(1995);国家人事部评选为首批跨世纪中青年学术带头人而被纳入“百千万人才工程”(1997);教育部评选纳入“跨世纪优秀人才培养计划”(1999)。出版个人专著和文集15部;主编专业著作百余部,刑法教材10余部。其中代表性论著主要有:《犯罪未遂的理论与实践》(1987)、《犯罪主体论》(1989)、《刑法研究系列》(5卷,1996—1997)、《当代刑法理论探索》(主编,4卷,2003)、《刑法基本理论专题研究》(2005)等。在国内外报刊上发表论文500余篇。主持中外科研项目近40项。论著和个人曾30余次获奖。主要研究领域为中国刑法、中国区际刑法、国际刑法。

## 总序

现代化的国家是法治国家。现代文明进步的社会是法治社会。我国依法治国、建设社会主义法治国家之基本治国方略的确立及其贯彻,对社会的发展进步至关重要。而现代刑事法治则在现代化法治国家中扮演着非常重要的角色。改革开放后的二十多年来,我国的刑事法治已经取得了长足的进步。但是,在新世纪建设社会主义法治国家的进程中,无论是刑事法学理论还是刑事法治实践,都仍需要进一步发展与完善,以更为充分地发挥其应有的作用。

北京师范大学刑事法律科学研究院于2005年8月建立,系专门从事刑事法学研究的、中国刑事法学领域首家且目前唯一的具有独立性、实体性、综合性的学术研究机构。研究院以一批中青年专家学者为中坚,并聘请了包括老一辈著名刑法学家、中央政法机关专家型领导以及重要国际组织领导人在内的国内外知名刑事法专家、学者担任特聘顾问教授、专家委员会委员、兼职教授(研究员)。研究院的设立,旨在建设全国领先并与国际知名刑事法学机构看齐的新型刑事法学术机构,本着刑事法学一体化的精神,逐步全面发展中外刑法学、国际刑法学、区际刑法学、刑事政策学、犯罪学、刑事执行法学、中外刑事诉讼法学、刑事证据学、刑事司法制度等刑事法的诸多学术领域,培养高级刑事法学专门人才,为中国法学研究和高层次人才培养进行新的探索,力争为中国依法治国、建设社会主义法治国家的伟大事业在刑事法学领域作出更大的贡献。

为达此目标,研究院成立伊始即创办“京师刑事法文库”。研究院的主要成员在中国人民大学刑事法律科学研究中心工作时,亦曾设立

“刑事法律科学文库”与“国际刑法研究所文库”，并已颇具规模。为获得更为广阔的学术发展空间与学术交流平台，数位专家学者首批加入北京师范大学创立了全国首家实体性的刑事法律科学研究院。学术事业是薪火相传、继承发展的事业，为使刑事法学术事业得到进一步传承和发扬，北京师范大学刑事法律科学研究院遂在我们设立的原“刑事法律科学文库”与“国际刑法研究所文库”的基础上，重新创办两个系列著作项目，并定名为“京师刑事法文库”和“京师国际刑事法文库”。两个文库是分工不同、相辅相成的姊妹项目，前者以国内刑事法著作为范围，后者以国际刑事法著作为范围。两个文库以百年名校北京师范大学深厚的学术积淀、悠久的历史传统和浓郁的文化氛围为依托，凭借北京师范大学坚实宽广的人文社会科学和自然科学的综合实力，并广泛争取和吸纳中外刑事法学界的支持与帮助。“京师刑事法文库”的出版领域主要包括国内刑事法律与刑事法学方面（包括刑法、犯罪学、刑事执行法学、刑事诉讼法学、刑事侦查、刑事物证技术等领域）的有新意、有深度、有分量的著作与译作，也会涉及我国港澳台地区刑法暨中国区际刑事法等领域的科研成果，可以是专题研究、综合研究，也可以是论集、有价值的文献资料等形式。同时，为积极关注刑事法治领域重大现实问题，“京师刑事法文库”还将相关专题的著作予以集中，设立若干系列，并聘请著名刑事法学专家担任总主编。文库的作者以研究院专职、兼职研究人员为主，并向其他专家、学者开放。

我们希望通过文库形式能逐步积累学术成果，繁荣、深化和开拓刑事法领域的学术研究，促进国内外刑事法学界的交流合作，不断提高我国刑事法理论与实践水平，进而有力地促进国家现代法治之昌盛和社会的文明进步。

北京师范大学刑事法律科学研究院

院长 赵秉志教授

谨识于乙酉年初秋



## 前言

刑法是关于犯罪、刑事责任和刑罚的法律。在现代法治社会中,刑法担当着保卫社会 and 保障人权的重任,扮演着事关社会稳定与文明发展的重要角色。可以说,它是现代法治社会赖以建立和正常运作所不可或缺的基本法律,故为各国所重视。

新中国建立之后,国家就十分重视刑法的立法工作。虽然由于众所周知的原因,中国的法治建设曾遭遇过挫折,但自1979年颁布第一部刑法典以来,中国的刑事法治建设得以全面开展,并且进展显著,令世人瞩目。我们坚信,随着中国社会主义市场经济体制的确立和发展,随着依法治国、建设社会主义法治国家之基本治国方略的确立和推行,随着市场经济条件下平等观念和民主法治观念的弘扬,中国的刑事法治建设必将不断发展进步。但同时我们也应当清醒地认识到,作为刑事法治重要组成部分的中国刑法立法还存在着一些不尽如人意而亟待改进的薄弱环节:从立法思想上看,中国的刑法立法尚未能全面贯彻现代法治理念,没有充分反映和满足市场经济的要求,并具有明显的重刑主义的倾向;从法律规范上看,存在着设计不尽科学、不够合理,用语不严谨等问题。这些问题的存在,影响了中国的刑事法治建设,制约着中国刑事法治现代化的进程。

我们师生二人,一位年近耄耋,一位已届知天命之年,都以刑法学教学与研究为己任,对新中国刑事法治事业抱有使命感。承蒙国家的培养、关怀与器重,高铭暄教授自1954年至1979年间作为专家学者应邀自始至终参加新中国第一部刑法典即1979年刑法典的起

草工作,并且参加了国家立法机关主持的1997年刑法典的修订研讨工作暨多年来的有关刑法立法工作;赵秉志教授自1988年至1997年间,应邀作为全国人大常委会法制工作委员会刑法修改小组成员,全程参加了国家立法机关主持的1997年刑法典修订的研拟和研讨工作,并亦参加了晚近十多年来国家立法机关的刑法立法修订之研拟、研讨工作。可以说,结合参加国家刑法立法创制、修订工作和理论研究的需要与兴趣,对中国刑法立法工作的关注与研究是我们两人学术生涯中的一个重要方面。我们自感有义务为新中国刑法立法的发展与完善作些贡献,为不同法系、不同经济基础、不同国度间的刑事法治之间的对话与沟通尽绵薄之力。有鉴于此,我们在较为充分地占有和把握中国相关刑法立法文献资料的基础上,以中国刑法立法之演进为视角,编撰了本书。

本书内容共分为六章。前两章比较概要地介绍了新中国成立之前的各个历史时期的刑事立法形式、犯罪规范及刑罚体系的发展演变及其规律;第三章至第五章系本书的重点部分,系统、全面地介绍了新中国的刑法立法,尤其是翔实而又客观地检阅和总揽了新中国两部刑法典即1979年和1997年刑法典的立法过程及其修改补充情况,并简要地介绍了中国立法机关为进一步明确有关的刑法规范所作的立法解释之背景及内容。可以说,这一部分客观全面地展现了新中国半个多世纪以来刑法立法的孕育、诞生和逐步完善的历史进程;第六章立足于中国当前刑法立法的现状,预测和前瞻了中国刑法的中长期发展目标,并对其若干重大问题的发展完善作了探索并提出建言。为促进中外刑法学界的交流与沟通,让西方国家对我国刑事法治发展进步的状况与前景有正确而又全面的了解,我们特意邀请北京师范大学刑事法律科学研究院博士后研究人员王俊平副教授、中国人民大学法学院刑法专业博士生李山河讲师将全文译成英文,使本书能够以中英文对照本的形式面世。同时,我们还附编了包含迄今为止中国全国人大常委会通过的六个修正案在内的《中华人民共和国刑法典》、单行刑法以及刑法立法解释的英文文本。我们期待本书的出版,既能为初入刑法学殿堂的年轻学子们全面地把握中

国刑法立法的历史演变规律提供导引性帮助,能为法学研究、法律实务工作者提供参考,也期待本书能够成为西方专家学者和有关方面全面正确了解中国刑法立法现状及其发展趋向的窗口。当然,本书难免有疏漏不当之处,诚望国内外读者商榷指正。

本书与我们二人另编并也将交由法律出版社出版的《中国刑法立法文献资料精选》一书可以说是姊妹篇。《精选》是我国刑法立法重要文献资料的荟萃,是反映国家刑法立法工作的第一手资料;而本书则是我们依据刑法立法文献资料对我国刑法立法(以新中国时期为主,简要上溯至古代、近代中国)之发展历程、重要问题及未来发展的论述。二书内容不同,但宗旨一样,具有相辅相成、相得益彰之功效。

中国有句名言曰:“夫以铜为镜,可以正衣冠;以古为镜,可以知兴替;以人为镜,可以明得失。”我们相信,通过全面审视和准确把握中国刑法立法发展的历史轨迹,客观总结中国各个历史时期的刑法立法之成就,反思其得失,不仅对当代中国刑事法治的发展与完善,乃至对中国法治建设和社会的文明进步,具有积极的意义和价值,而且也会有助于不同国家和地区的刑事法治通过相互比较借鉴得以共同发展完善。

最后,有必要提及的是,本书的及时出版得到了我们的出版界好友法律出版社社长黄闽先生的鼎力支持,责任编辑徐雨衡女士认真严谨和卓有成效的编辑工作显著提高了本书的整体质量,在此一并深致谢忱。多年以来,法律出版社作为国家权威的法律专业出版社,在学术书籍出版形势较为严峻的情况下,通过鼎力支持编辑出版法律学术书籍对中国社会主义法治和法学研究事业作出了有目共睹的杰出贡献,也对我们所在单位的刑事法学术书籍出版一贯关照,愿我们的学术合作事业繁荣发展,学术友谊不断增进。

高铭暄 赵秉志 谨识

2006年7月

于北京师范大学刑事法律科学研究院

**Gao Mingxuan**, a native of Yuhuan, Zhejiang Province, was born in 1928. In 1951, he graduated from Law Faculty of Beijing University, and then, as postgraduate majoring in Criminal Law, he studied in Law Faculty of Renmin University of China and graduated in 1953. After that, he took a teaching post there, and has ever assumed many duties such as Dean of Law Faculty of Renmin University of China, Dean of the Administrative Affairs Committee of the Law School, member of the 2nd, 3rd and 4th session of the Deliberation Group of Academic Degrees Committee of the State Council and Convener of Legal Science Group thereof, Vice President of China Law Society, and President of Criminal Law Research Committee of China Law Society, etc. . At present, he is not only Honorary President of College for Criminal Science of Beijing Normal University, Specially Invited Consultative Professor and Tutor for Doctor Candidate, but also an Honorable Professor of Renmin University of China . In the meantime, Mr. Gao also holds several concurrent posts such as Vice Director of Academic Committee of China Law Society, Honorary President of Criminal Law Research Committee of China Law Society, and Vice Chairman of AIDP and also Chairman of China Group of AIDP. Specially Invited Consultant of the Supreme People's Court of the PRC, and Consultant of the Research Division of the Supreme People's Procuratorate of the PRC, etc. . Mr. Gao was ever invited as an expert to participate in the work to draft the first criminal code, the 1979 Criminal Code, of the New China during the whole period, also in the revision work of the 1997 Criminal Code and in some other relevant criminal legislation works for many years under the leadership of the national legislature. In addition, Mr. Gao always

participates in the research and consultation works for the top judicial organs' drafting judicial interpretations. Centering around such areas as domestic and international criminal law, and criminal legislation, his main research interests, Mr. Gao has published not only as many as 90 academic books independently or coauthored with others but also over 270 articles, among which his representative publications are as follows: *Gestation and Naissance of the Criminal Law of PRC* (1981), *Substances of the General Part of Criminal Law* (1986), *Criminal Law Science of China* (editor-in-chief, 1989), *Principles of Science of Criminal Law* (3 Volumes, editor-in-chief, 1993), *Research on Criminal Law* (1994), *Pandects of the New China Legislative Documents with Respect to the Criminal Law* (coauthored with Professor Zhao Bingzhi, 1998), *Research on New Types of Economic Crimes* (editor-in-chief, 2000), and *Gains from Probing into Criminal Law* (2004), etc. . Some works have ever been awarded, such as National Library Prize, First Prize of Excellent Textbook of China National Level and First Prize of Excellent Textbook of China Judicial Ministry, Special Prize of Excellent Textbook of Second China Colleges and Universities, and First Prize of Excellent Textbook of Ministry of Justice of China, etc. .

**Zhao Bingzhi**, a native of Nanyang, Henan Province, was born in 1956. First Holder of Criminal Law Doctorate in the New China (1988), Visiting scholar at Law School of Duke University of US (1990 – 1991). At present, he is Presidents of College for Criminal Science and Law School of Beijing Normal University, Professor and Tutor for Ph. D. Candidates. In the meantime, Mr. Zhao also holds several concurrent posts such as Member of Academic Committee of China Law Society and Standing Member of this Society, President of the Criminal Law Research Committee of China Law Society, Executive Vice-president of the China Group of AIDP, member of the Legal Science Group of the Deliberation Group of Academic Degrees Committee of the State Council, Specially Invited Consultant of the Supreme People's Court of the PRC, and Consultant of the Research Division of the Supreme People's Procuratorate of the PRC, etc. . Mr. Zhao has ever been Director of the Research Center for Criminal Jurisprudence of Renmin University of China (1999 – 2005), and has ever been invited as a member of criminal law revision group of the Commission of Legislative Affairs of the National People's Congress Standing Committee (1988 – 1997). In 1991, he was conferred the title "Chinese doctorate winner of making prominent contributions" by the State Education Committee and the Degree Committee of the State Council; in 1995, the title "Ten Distinguished Young Jurists" by China Law Society; in 1997, evaluated as "Young Academic Leader over the Century" by Ministry of Personnel of the PRC, and brought into "Training Project for Excellent Academic Elites over the Century" by Ministry of Education of the PRC. His representative works are as follows: *The Theory and Practice of Criminal*

*Attempt*(1987) , *On Criminal Subject*(1989) , *Serial Studies on Criminal Law*( five Volumes,1996 – 1997 ) , *Exploring the Contemporary Theory of Criminal Law* ( editor-in-chief, four Volumes, 2003 ) , *Special Research on Basic Theories of Criminal Law*(2005) . He has authored 15 books independently, and published more than 100 academic books ( chief editor ) , more than 10 criminal law textbooks, and more than 500 articles on the newspapers and periodicals of China and other foreign countries. He has won prizes as many as 30 times for his publications. In addition , he has been in charge of 40 kinds of scientific research projects of China and other foreign countries. His main research areas are criminal law of China, Trans-regional criminal law of China and international criminal law.

## Foreword

A modern country and a modern civilization should be governed by law. The establishment and actualization of the principal guideline of rule by law is crucial for our society to make progress in the efforts of constructing socialism under rule of law. Modern criminal law, playing a very important part in the development of modern society under rule of law, has achieved great progress in the past two decades since 1978 when the reform and opening-up policy was carried out. Whereas, further development and reform for both theory and judicial practice of criminal law are required in the process of building socialist legal democracy, so as to bring it into full play.

The College for Criminal Jurisprudence Studies of Beijing Normal University, founded in August of 2005, is the first and, at present, the only academic research organ in China specializing in criminal jurisprudence that is independent and comprehensive entity. The College is staffed with a group of famous young and middle-aged criminologists as academic nucleus and a group of criminologists and scholars known home and abroad as specially invited consultative professors, member of experts committee, guest research fellows ( professors ), including those senior professors, leaders with judicial expertise from the central procuratorial, judicial and public security departments and leaders of some important international academic organizations. The college, ai-



ming at turning into a new national leading academic body which can keep pace with international prestigious organs of criminal jurisprudence, is gradually extending its research fields covering Chinese and foreign criminal jurisprudence, international criminal law, trans-regional criminal law, criminal policy science, criminology, criminal executive law, Chinese and foreign criminal procedure law, criminal evidence law, criminal judiciary and so on following the spirit of integrated criminal science. Meanwhile, the College trains high-level criminal jurisprudence professionals and makes new exploration into research of jurisprudence and cultivation of high-level professional in China. We are trying our best to make a greater contribution in the field of criminal law science to the great cause of building our socialism under rule of law.

Cherishing this hope, the College initiated the *Criminal Law Library of BNU* as soon as it is founded, with the working experience of *Criminal Jurisprudence Library of RUC* and *International Criminal Jurisprudence Library of RUC* which had been established in the Criminal Jurisprudence Research Center of RUC and in a rather large scale before the main staff's transfer to the College. In order to obtain a broader space for academic research, we six scholars transferred from RUC to BNU and founded this first and the only one independent academic entity in our country—College for Criminal Law Science of BNU. Learning is a continuous business, so the College re-establishes two book-series programs named “*Criminal Law Library of BNU*” and “*International Criminal Law Library of BNU*” based upon the former two libraries so as to further develop our academic cause. The two sisterly programs undertake different missions and supplement each other. The domain of the former focuses on domestic criminal jurisprudence literatures and the latter on international criminal jurisprudence literatures. Depending upon the profound academic deposit, centuries-old historical traditions and full-bodied cultural atmosphere of the prestigious Beijing Normal Uni-